89-1360

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ALLAN DEVORE, PETITIONER

v.

STEPHEN R. KERR AND
WILLIAM O. JOHNSTONE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. What is the proper standard of review by an appellate court of a district court's award of sanctions under Rule 11 of the Federal Rules of Civil Procedure.

2. Do the administrative functions of the court in promulgating rules of procedure override the general substantive rules of law.

LIST OF PARTIES

The Petitioner is Allan DeVore.

The Respondents are Stephen R. Kerr and William O. Johnstone.

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IN THE
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OCTOBER TERM, 1990

ALLAN DEVORE, PETITIONER

v.

STEPHEN R. KERR AND
WILLIAM O. JOHNSTONE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner, Allan DeVore, respectfully prays that a writ of certiorari issue to review the orders and judgments of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 17, 1989 and October 31, 1989.

OPINIONS BELOW

The orders and judgments of the Court of Appeals, which are unreported, appear in Appendix A and B. The orders of the United States District Court for the Western District of Oklahoma, which are unreported, appear in Appendix C through I.

JURISDICTION

The orders and judgments of the Court of Appeals were entered on August 17, 1989 and October 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Rule 11, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

1. Nature of the Controversy.

The Petitioner was retained by his clients to file a lawsuit against the Respondents, as officers and directors of United Oklahoma Bank ("UOB") and other defendants for violations of the RICO Act, 18 U.S.C. §1961-62, mail fraud, 18 U.S.C. § 1341, and common law fraud. Prior to commencing the action, Petitioner and his clients were advised of, or obtained, the following facts with respect

to the validity and reasonableness of their claims: (1) the Respondents represented to Petitioner's clients that the "prime" or "base" rate was the lowest rate that UOB loaned to its best commercial customers; (2) other UOB customers advised Petitioner's clients that Respondents had informed them that the UOB's "prime" rate was the rate at which UOB made loans to its best commercial customers; (3) Petitioner's co-counsel in this case advised the Petitioner that UOB had made various loans to UOB customers at less than UOB's "prime" rate; (4) Petitioner inspected documents maintained by UOB, which had been transferred to the custody of the FDIC, and determined that a significant number of loans had been made at less than the "prime" rate; and (5) Petitioner met with a former vice-president and loan officer of UOB, and obtained an affidavit reflecting that it was UOB's policy to represent to commercial customers that UOB's "base" rate was the lowest rate at which the bank made loans to its commercial customers. Based upon this factual inquiry, Petitioner commenced this action on behalf of his clients.

Respondents filed a motion to dismiss the complaint under Fed.R.Civ.P. 9(b) and 12(b)(6) which was treated as a motion for summary judgment by the district court and granted. The district court further awarded Respondents sanctions in the form of attorney's fees and costs against the Petitioner and his clients. The district court held that testimony advanced by Petitioner's clients in another case in which he did not represent them negated material allegations contained in the complaint.

The district court further held that Petitioner and his clients failed to conduct a reasonable inquiry before filing the complaint to determine if the allegations contained therein were well-grounded in fact and warranted by existing law. Finally, the district court held that Petitioner's filing of an amended complaint naming the Respondents pending the court's ruling on Petitioner's motion to reconsider the order granting summary judgment in favor of Respondents was not warranted by existing law.

2. The Proceedings Below.

On February 12, 1988, the Petitioner filed a lawsuit on behalf of his clients against the respondents and other defendants, charging common law fraud, violations of the RICO Act, 18 U.S.C. §1961-62, and mail fraud, 18 U.S.C. §1341. The Respondents and the other defendants moved separately to dismiss the complaint. Over Petitioner's objection to Respondent's motion to dismiss, the district court treated the motion to dismiss as a motion for summary judgment and granted summary judgment in favor of Respondents. In addition, the district court granted the other defendants' motion to dismiss and granted the Petitioner ten days to amend the complaint. The Petitioner filed a motion to reconsider the order granting summary judgment in favor of Respondents. The Respondents filed a motion to impose sanctions on Petitioner's clients. The Petitioner filed an

amended complaint naming the Respondents and the other defendants which remedied the alleged defects contained in the original complaint. The Respondents then amended their motion for sanctions to seek sanctions against Petitioner as well as his clients. The district court denied Petitioner's motion to reconsider. After a hearing, the district court granted Respondent's motion and awarded sanctions against Petitioner and his clients.

On appeal, the Tenth Circuit affirmed the lower court's award of sanctions against the Petitioner and his clients. The Appeals Court held that the district court did not abuse its discretion in awarding sanctions against Petitioner and his clients.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in direct conflict with earlier holdings of other Appeals Courts. The Appeals Court has reviewed the factual and legal conclusions of the district court in arriving at its decision to affirm the award of sanctions against the Petitioner by using the abuse of discretion standard of review rather than the de novo standard of review or a hybrid thereof as are used in other circuits. In its opinion, even the Court of Appeals recognized the varying standards of review used in other circuits although it chose not to endorse a less stringent standard in Rule 11 cases. Since there is a clear conflict between

the circuits as to the proper standard of review on sanctions cases, review by this Court is urgently required.

I. THE DECISION BELOW IMPROPERLY HELD THAT THE PETITIONER'S ACTIONS, WHEN REVIEWED UNDER THE ABUSE OF DISCRETION STANDARD RATHER THAN UNDER THE DE NOVO STANDARD, WERE IN VIOLATION OF RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Tenth Circuit Court of Appeals has adopted an "abuse of discretion" standard of review across the board to all Rule 11 issues. *Adamson v. Bowen*, 855 F.2d 668 (10th Cir. 1988). Similarly, other circuits have adopted the same standard. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988); *Century Products, Inc., v. Sutter*, 837 F.2d 247 (6th Cir. 1988); *EBI Inc. v. Gator Industries, Inc.*, 807 F.2d 1 (1st Cir. 1986); *Stevens v. Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056 (4th Cir. 1986); *Cf. Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718 (3rd Cir. 1988).

The Eighth Circuit Court of Appeals' review of a district court's Rule 11 award consists of three prongs. The factual findings that form the basis of the asserted violation are reviewed under the clearly erroneous standard. The determination that a violation of the rule as shown by those findings is a legal conclusion which is

reviewed de novo. Finally, the appropriateness of the sanction is reviewed for abuse of discretion. *U.S. v. Carasis*, 863 F.2d 615 (8th Cir. 1988). Similarly, the Ninth and Seventh Circuit Courts of Appeal have adopted the same standard. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *King v. Idaho Funeral Services Ass'n*, 862 F.2d 744 (9th Cir. 1988); *Brown v. Federation of State Medical Board of U.S.*, 830 F.2d 1429 (7th Cir. 1987).

Some courts take either a de novo or an abuse of discretion approach, depending on the type of Rule 11 violation alleged. The circuits apply de novo review to allegations that a pleading was not well grounded in existing law or supported in a good faith argument for its extension, modification, or reversal; but they review for abuse of discretion if the pleading is alleged to be either not well-grounded in fact or imposed for any improper purpose. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985).

The idea that an Appellate Court should have a predisposed idea about the validity of a lower court's finding that a pleading is not well-grounded in fact is contrary to the basic principles underlying our justice system. While a lower court may be in a better position to weigh the facts and reach a factual finding therefrom, the same cannot be said for legal determinations made by the district court. Whether a pleading or motion is legally sufficient involves a question of law; accordingly,

the Appellate Courts are in as good a position as the lower courts in making this legal determination and the de novo standard of review is the appropriate standard to be applied in these instances.

II. THE DECISION BELOW IMPROPERLY IMPOSED SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE ON AN ATTORNEY WHO FOLLOWED THE GENERAL SUBSTANTIVE RULES OF LAW.

The Federal Rules of Civil Procedure are designed with the purpose of implementing the exercise of jurisdiction which has been conferred by Congress or statute. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Edwards v. E.I. Dupont de Nemours & Co.*, 183 F.2d 165 (5th Cir. 1950). Any construction of Fed.R.Civ.P. 11 must necessarily begin with an eye toward the Rules Enabling Act, 28 U.S.C. §2072. After delegating to the Supreme Court the authority to regulate practice and procedure, The Rules Enabling Act reads, in pertinent part, "[S]uch rules shall not abridge, enlarge or modify any substantive rights..." *Port Drum Co. v. Umphrey*, 119 F.R.D. 26 (E.D. Tex. 1988).

In order for Rule 11 to be valid under the Rules Enabling Act it must be of a procedural nature, rather than substantive. "The test must be whether a rule really regulates procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for

justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). *Quinones v. Pennsylvania General Ins. Co.*, 804 F.2d 1167 (10th Cir. 1986). Rule 11 is a rule that regulates procedure rather than a rule that creates new substantive rights. *Matter of Adams*, 734 F.2d 1094 (5th Cir. 1984).

Since it is the administrative function of the Court to promulgate rules such as Rule 11, it naturally flows that when disciplinary rules conflict with general substantive rules of law, the substantive rules control. In the case at hand, the Appeals Court affirmed the award of sanctions against the Petitioner holding that the filing of an amended complaint naming the Respondents, after having been granted leave by the district court to file the same as to Respondents' co-defendants pending the court's ruling on Petitioner's motion to reconsider, was in violation of Rule 11. The court reached this conclusion even though the order granting Respondents' motion for summary judgement was not a final appealable order pending the district court's decision on Petitioner's motion to reconsider. In reaching its decision, the lower court relied on the provisions of procedural Rule 11 rather than on the general substantive law which is controlling in this matter.

The courts have held that the filing of an amended complaint complete in itself, not referring to the original complaint or prior amendments, is an abandonment of all prior averments not contained in the amended complaint.

Accordingly, no reference can be made to the original pleading abandoned by substituting a pleading. *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982); *Edwards v. Andrews, Davis, Legg Bixler, Milsten and Murrah, Inc.*, 650 P.2d 857 (Okla. 1982). The filing of an amended complaint which omits an individual as a party defendant has the effect of dismissing such a party from the cause of action. *Gravitt v Southwestern Bell Telephone Co.*, 396 F.Supp. 948 (1975). The same rule followed by state courts is applicable under federal rules, so that in a federal court an amended complaint supercedes and replaces any prior complaint filed by the plaintiff. *Buck v. New York Central Railroad*, 275 F.2d 292 (7th Cir. 1960). *Loux v. Rhay*, 375 F.2d 55 (9th Cir. 1967), held that an amended complaint supercedes the original, the latter being treated as nonexistent.

The Petitioner was required to name all of the party defendants, including Respondents, in his amended complaint so as not to abandon his client's claims against Respondents. By filing an amended complaint which is complete in itself, a plaintiff abandons his former complaint and all matters not restated in the amended complaint. *Adams v. Lederly Laboratories*, 569 F.Supp. 234 (W.D. Mo. 1983). In *Adams*, the court stated:

> All this being so, I have considerable conceptual difficulty understanding how a defendant who is wholly omitted from an amended petition can be said to remain in a case, any more so than would a claim against him which is omitted. In theory,

> the original petition has ceased to exist - has evaporated, as it were - as a vehicle by which any relief can be granted to plaintiff. *Id.* at 240.

The filing of an amended complaint by Petitioner which named all of the original parties, including Respondents, was consistent with and authorized by the prevailing substantive law in this area. Petitioner's reliance on the general substantive rules of law when no exceptions exist therein cannot give rise to Rule 11 sanctions. To do so would allow the procedural aspects of Rule 11 to modify and abridge the prevailing substantive law in this area and would clearly be in violation of the Rules Enabling Act under which the Court received its authority to invoke procedural rules.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES,INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS SUMMARY JUDGMENT

This matter comes before the court on a Motion to Dismiss by defendants Stephen R. Kerr and William O. Johnstone. The plaintiffs' argument focuses on a motion to dismiss. But the plaintiffs, as well as the defendants, have presented matter s outside the pleadings by way of attachment to the briefs for the court's consideration. The plaintiffs may not have their exhibits and affidavit considered without the court considering the defendants' attachments also. When the court considers matters outside the pleadings, the motion is to be considered as a motion for summary judgment under Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(b). Rule 56 requires that summary judgment be rendered then "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). After the moving party presents evidence that there is "no genuine issue of material fact," it is the responding parties' duty to set forth facts in rebuttal. Fed.R.Civ.P. 56. The defendants' motion is granted pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

During the period between October, 1981, and February, 1986, the plaintiffs, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill, borrowed money from the defendant United Bank of Oklahoma ("Bank"). The defendants Stephen R. Kerr and William O. Johnstone were officers of the Bank at the time of the filing of this lawsuit. In return for the borrowed money, the plaintiffs executed notes which provided for interest at rates based

on the Bank's "prime rate" or "base rate". The Bank periodically mailed the plaintiffs notices or statements which recited the amount of interest.

During this period Ronald M. Hill served as a director of the Bank. As a member of the board, Ronald Hill had constructive, if not actual knowledge, of the interest rates being charged to the customers of the Bank.

The facts in the case of *Pappas v. NCNB Nat'l. Bank of North Carolina*, 653 F.Supp. 699 (M.D.N.C. 1987) are almost identical to the case at bar. In *Pappas*, the bank allegedly "misrepresented the prime rate by sending out monthly statements which overstated its prime rate." Id. at 703. The plaintiffs misunderstood the meaning of the term "prime rate", and the defendants did not correct the misunderstanding. The defendant mailed out statements reflecting the interest rate charged to the defendants. The court found that although the plaintiffs made the wrong assumption of the interest rate, the failure to correct this incorrect assumption was not a material misrepresentation by the bank. The trial court found that the plaintiffs have failed to establish either common law fraud or mail fraud and granted summary judgments.

The defendants, Kerr and Johnstone, through the depositions of the plaintiffs, have shown that plaintiffs' basis of fraud is the plaintiffs' own incorrect assumption that the terms "prime rate" and "base rate" were the rates charged the most credit-worthy customers. The plaintiffs

have failed to present any facts showing (1) that either Kerr or Johnstone represented that the term "base rate" meant the rate available to the Bank's most credit-worthy commercial borrowers; (2) that Kerr or Johnstone directed any employee to use the United States mail to make such a representation; or (3) that such a representation was made to the plaintiffs.

The plaintiffs do present the affidavit of Mr. Lippman. Mr. Lippman posits that it was the policy of United Oklahoma Bankshares, Inc. to represent its prime rate to be the rate charged the most creditworthy customers. However, plaintiffs have not shown that this representation was made to them. Thus, this policy cannot be the basis of plaintiffs' action for fraud. The plaintiffs have not presented any evidence to show a genuine issue of material facts.

Plaintiffs' RICO claim must be supported by a statutorily specified underlying fraudulent act. The plaintiffs, having failed to show any fraudulent act by either Kerr or Johnstone, have not presented a RICO cause of action. This court thus finds that the defendants Kerr and Johnstone are entitled to summary judgment as a matter of law. See *Pappas*, 653 F.Supp. at 703-04.

Additionally, Ronald M. Hill has previously litigated his common law fraud claim. The court found that, as a matter of law, Ronald M. Hill could not bring a cause of action based on common law fraud. This finding is sufficient to sustain a motion to dismiss in the present

case. *Hill Resources, Inc. v. Federal Deposit Ins. Corp.*, No. CIV-87-267-R, (W.D. Okla. Oct. 27, 1987) (order granting summary judgment). Therefore, Ronald M. Hill's claim based on common law fraud should be dismissed against defendants, Kerr and Johnstone.

IT IS ORDERED, ADJUDGED AND DECREED

that the motion to dismiss of defendants, Stephen R. Kerr and William O. Johnstone, is treated as a motion for summary judgment and is granted.

Entered on the Judgment Docket this 13th day of September, 1988.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS UNITED OKLAHOMA BANKSHARES, INC. AND MORRISON G. TUCKER'S MOTION TO DISMISS

This matter comes before the court on a motion to dismiss by United Oklahoma Bankshares, Inc. ("UOB") and Morrison G. Tucker. After careful consideration of the briefs and legal authorities, the motion is granted.

The motion of UOB and Tucker was filed pursuant to Rule 12(b)(6) and Rule 9(b), Fed.R.Civ.P. Rule 9(b) requires that "all averments of fraud [and] the circumstances constituting fraud...shall be stated with particularity." There are several purposes for this rule: (1) Lawsuits should be initiated as a "redress for wrong rather than attempting to discover unknown wrongs;" *D&G Enterprises v. Continental Illinois Bank and Trust Co. of Chicago*, 574 F.Supp. 263 (N.D. Ill. 1983) (*citing Gross v. Diversified Mortgage Investors*, 431 F.Supp. 1080, 1087 (S.D.N.Y. 1977), aff'd. 636 F.2d 1201 (2d Cir. 1980); (2) Harm to defendants of a false charge of fraud should be avoided, *Kronfeld v. First Jersey National Bank*, 638 F.Supp. 1454 (D.N.J. 1986); and (3) Each defendant should be put on notice of the particular part played by that defendant. *D&G Enterprises*, 574 F.Supp. at 267. Thus the complaint must include time, place, the contents of the representations, and the identity of the party making them. Id. This requirement applies to RICO as it applies to common law fraud. *Soper v. Simmons Int'l Ltd.*, 632 F.Supp. 244 (S.D.N.Y. 1986).

Instead of alleging the facts with particularity as to each defendant, plaintiffs have lumped dates and circumstances together. For instance, the plaintiffs borrowed money from October 1981, through February, 1986. Complaint, paragraph 9. The plaintiffs then state the defendants Kerr, Johnstone, and Tucker, at all times during the above period misrepresented the prime rate to its customers, which representations were authorized by UOB. Clearly, these allegations are not set out such that the defendants are on notice of who made the representations and when, other than generally, those were made.

These allegations do not comply with Rule 9(b)'s requirement that the time, place, contents of the representations, and identity of persons making such representations be stated with particularity. See Fed.R.Civ.P. 9(b); *Coronet Ins. Co. v. Seyfarth*, 665 F.Supp. 661, 666 (N.D. Ill. 1987); *Cook v. Zions First Nat'l Bank*, 645 F.Supp. 423, 425 (D.Utah 1986); *Van Dorn CO., Cent. States Can Co. Div. v. Howington*, 623 F.Supp 1548 (N.D. Ohio 1985). Additionally, the RICO complaint requires the allegations of facts showing reliance on the alleged false statements. *Blount Financial Services, Inc. v. Walter E. Heller & Co.*819 F.2d 151, 152 (6th Cir. 1987). This the plaintiffs have failed to do. Therefore, the plaintiffs have failed to fulfill their responsibility under Fed.R.Civ.P. 9(b) and 12(b)(6).

IT IS THEREFORE ORDERED that the motion to dismiss filed by defendants UOB and Tucker is granted.

The plaintiffs have ten (10) days within which to file an amended complaint.

Entered in Judgment Docket this 26th day of September 1988.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER DENYING MOTION TO RECONSIDER

This matter comes before the court on plaintiffs' Motion to Reconsider. The plaintiffs argue that it was improper for the court to consider defendants' Motion to Dismiss as a motion for summary judgment. The

impropriety, plaintiffs contend, arises because they did not have adequate notice of the defendants' factual contentions and were not given adequate time for discovery.

A motion to reconsider is not for the purpose of appealing an order, and the purposes are limited under Local Rule 14(G). As the defendants have noted, the plaintiffs have failed to identify the grounds on which their Motion to Reconsider is based. So the court, from a review of plaintiffs' brief, assumes that the grounds are to correct a mistake of law or fact, prevent manifest injustice, that is, that there has been an abuse of discretion. See *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656 (N.D. Ill. 1983).

For several reasons, the plaintiffs' argument fails. First, the plaintiffs attached documents outside the pleadings for the court's consideration. See *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir. 1986); *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985). Second, on June 15, 1988, the defendants, in their Motion and Brief in Support of Plaintiffs' Brief in Opposition to the Motion to Dismiss Filed by Defendants Stephen R. Kerr and William O. Johnstone, asked the court to consider their Motion to Dismiss as one for summary judgment. At that time the plaintiffs could have filed an objection, filed a motion to compel compliance with Local Rule 14(B), or asked for leave to supplement their response. Instead, they choose to do nothing and to appeal through a motion to reconsider.

Third, plaintiffs have attached the deposition of Morrison G. Tucker, taken on February 24, 1988; the Affidavit of Edwin J. Lippman, Jr., filed on May 5, 1988; and the affidavits of Irving A. Hill and Ronald M. Hill who as the plaintiffs were at all times available to plaintiffs' counsel. Thus, all the plaintiffs' counsel should have had access to all the information in the documents attached to the Motion to Reconsider at the time they filed their brief in opposition to the motion to dismiss. Further, at least some investigation should have been done under Rule 11 of the Federal Rules of Civil Procedure before the Complaint was filed.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is denied.

Dated this 18th day of October, 1988.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

This matter comes before the court on Motion to Dismiss of the defendants Stephen R. Kerr and Wm. O. Johnstone. No response has been filed. On September

13, 1988, this court granted summary judgment in favor of Kerr and Johnstone. Subsequently, the plaintiffs filed an Amended Complaint, once again asserting the same allegations as in the original Complaint. Since summary judgment was granted on those issues, the Amended Complaint, insofar as it relates to defendants Kerr and Johnstone, is dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants Stephen R. Kerr and Wm. O. Johnstone's Motion to Dismiss is granted.

Entered in Judgment Docket this 7th day of November, 1988.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER GRANTING MOTION FOR SANCTIONS

This matter comes before the court on defendants, Stephen R. Kerr and William O. Johnstone's (the "Defendants") motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and attorney's fees and

costs based on those sanctions. Hearing on the motion was held November 1, 1988.

Rule 11 requires counsel to make a reasonable inquiry into the facts and law before filing a complaint or an amended complaint. Compliance with Rule 11 is to be determined by viewing what inquiry was undertaken at the time of filing the pleading. *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987). At the time of filing, the attorney must have acquired information that supports his claims rather than solely relying on his clients' statements. *O'Rourke v. City of Norman*, 640 F.Supp. 1451, 1469 (W.D. Okla. 1986).

On February 123, 1988, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill (the "Plaintiffs"), filed the present lawsuit based on common law fraud and 18 U.S.C. §§1961-62 ("RICO") with the alleged predicate act of mail fraud under 18 U.S.C. §1341. At that time, *Hill Resources, Inc. v. Federal Deposit Insurance Corp.*, Case No. CIV-87-267-R, involving the same Plaintiffs and identical causes of action as the present case, and *Federal Deposit Insurance Corp. v. Hill Resources, Inc.*, Case No. CIV-87-767-T, were pending in this district. From the depositions of Ronald Hill and Irving Hill taken in Case No. CIV-87-767-T, it is clear that neither Kerr nor Johnstone made any misrepresentations to the Plaintiffs regarding the base rate or prime rate of interest charged by the United Bank of Oklahoma ("UBO") where the Defendants were employed as officers. Rather, the Plaintiffs' claims for fraud were based on their own

misconceptions of the meaning of the terms "prime rate" and "base rate."

The Plaintiffs and their counsel have not shown that a reasonable inquiry was made before the complaint was filed to determine if the allegations contained therein were well-grounded in fact and supported by law. In fact, Plaintiffs' own statements both in the depositions and at the hearing negate any support for the allegation that reasonable inquiry was made. Ronald Hill was a director of UBO during times that he alleges he was defrauded. Thus, before filing this suit, Ronald Hill had access to information related to the loans being made by UBO. Transcript of Hearing at 94-95 (November 1, 1988) [hereinafter cited as Transcript]. However, he did not use this available information to ascertain the truth of the facts alleged in the complaint. See Transcript at 111-12.

Plaintiffs' counsel has offered no evidence that he made a reasonable inquiry into the facts alleged in the complaint or the law underlying the complaint before filing this suit. In contrast, the defendants offered the expert testimony of Andrew Coats. He testified that the complaint should have never been filed because it was not well-grounded in the facts. Transcript at 20.

On September 13, 1988, this Court granted the Defendants' Kerr and Johnstone's motion to dismiss treating it as a motion for summary judgment. On September 26, 1988, this court granted the motion to

dismiss filed by Defendants United Oklahoma Bankshares, Inc., and Morrison G. Tucker and authorized the Plaintiffs to file an amended complaint within ten days thereof. On September 27, 1988, the Plaintiffs filed a motion to reconsider the court's ruling dated September 13, 1988.; In compliance with the court's order of September 26, 1988, the Plaintiffs filed an amended complaint on October 6, 1988.; On October 19, 1988, this court issued an order denying Plaintiffs' motion to reconsider.

Plaintiffs argue that inclusion of Kerr and Johnstone in the amended complaint would have waived the right to appeal the order granting Defendants' motion to dismiss which was treated as a motion for summary judgment. However, the plaintiffs have failed to cite any authority which supports this allegation. In fact, none of the cases cited by Plaintiffs involved an order granting summary judgment.

The Plaintiffs' cited authority does stand for the proposition that the failure to include Kerr and Johnstone as Defendants in the Amended Complaint would have had the effect of an order dismissing them from the action. See *Gravitt v. Southwestern Bell Telephone Co.*, 396 F.Supp. 948 (1975). But the September 13, 1988, order was a judgment on the merits and had dismissed the Defendants from this action. Thus, the allegations against Kerr and Johnstone in the Amended Complaint were unnecessary and unwarranted. So the inclusion of Kerr and Johnstone in the amended

complaint was unreasonable and not warranted by existing law.

Defendants, Kerr and Johnstone, have asked for attorney's fees and costs as an appropriate sanction under Rule 11. The undisputed expert testimony at the hearing confirms that the requested fees are fair and reasonable. Transcript at 19.

The court hereby finds the Plaintiffs' counsel, Allen DeVore, in violation of Rule 11 of the Federal Rules of Civil Procedure for filing a complaint and amended complaint without making reasonable inquiry into the facts to determine if they were well grounded and to determine if the pleadings and allegations contained therein were warranted by existing law or a good faith extension thereof. Therefore, the Plaintiffs and Plaintiffs' counsel, Allen DeVore, are ordered to pay, jointly and severally, to the Defendants, Kerr and Johnstone, attorney fees and expenses in the amount of Eighteen Thousand, Nineteen Dollars and Eight Cents. ($18,019.08).

IT IS THEREFORE ORDERED that Defendants William O. Johnstone and Stephen R. Kerr's Motion for Award of Attorney's Fees and Expenses and the supplement thereto is granted.

Dated this 1st day of December, 1988.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ORDER DENYING MOTION TO RECONSIDER

This matter comes before the court on a Motion to Reconsider filed by the plaintiffs, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill (Plaintiffs).

Rule 60(b) of the Federal Rules of Civil Procedure sets out the reasons for granting a motion to reconsider. The Plaintiffs have not made it apparent upon which reason(s) they are basing their motion. A reading of the motion and brief indicates that Plaintiffs are relying on Rule 60(b)(6): "any other reason justifying relief. . . ."

The court, in its order granting defendants' Motion For Sanctions dated December 1, 1988, set out the facts supporting its order. The Plaintiffs have failed to present reasons and facts justifying relief from the December 1, 1988, order.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is denied.

DATED this 10th day of January, 1989.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-88-226-B
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants.	)	

ENTRY OF FINAL JUDGMENT

NOW this matter comes on for consideration before the Honorable Luther Bohanon, Judge of the United

States District Court for the Western District of Oklahoma. After examining the file herein and noting that this Court has sustained Defendants Stephen R. Kerr and William O. Johnstone's Motion for Summary Judgment and Motion for Award of Attorney's Fees and Expenses, the Court finds that there is no just reason for delay of Entry of Final Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants, Stephen R. Kerr and William O. Johnstone are granted judgment against Plaintiffs on all causes of action of Plaintiffs' Complaint, thereby dismissing all of Plaintiffs' claims against Defendants Stephen R. Kerr and William O. Johnstone.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Fed. R. Civ. P. 11, Defendants Stephen R. Kerr and William O. Johnstone are granted judgment against Plaintiffs and Plaintiffs' counsel, Allan DeVore, that Plaintiffs and their counsel must pay, jointly and severally, to Defendants Stephen R. Kerr and William O. Johnstone, attorney's fees and expenses in the amount of $18,019.08.

Entered in Judgment Docket this 19th day of January 1989.

APPENDIX H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HILL RESOURCES, INC., a corporation, IRVING A. HILL,an individual, and RONALD M.HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)
Plaintiffs-Appellants,	)
and	)
ALLAN DEVORE,	) No. 89-6045
Appellant,	) (D.C. Civil) No. 88-226-
v.	) B) (W.D.) Okla.)
STEPHEN R. KERR, an individual, and WILLIAM O. JOHNSTONE, an individual,	)
Defendants-Appellees,	)
MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC.,an Oklahoma bank holding corporation,	)
Defendants.	)

ORDER AND JUDGMENT*

Before EBEL, SETH and McWILLIAMS, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Irving A. Hill, Ronald M. Hill ("the Hills"), and their attorney, Allan DeVore, appeal the district court's order granting Stephen R. Kerr and William O. Johnstone's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and attorney's fees and costs based on those sanctions. We affirm.

On February 12, 1988, the Hills filed suit against appellees, among others, charging common law fraud, violations of the RICO Act, 18 U.S.C. §§1961-62, and

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

mail fraud, 18 U.S.C. §1341. Appellees moved to dismiss the complaint. The district court treated the motion to dismiss as a motion for summary judgment, and granted summary judgment in favor of appellees. The Hills filed a motion to reconsider the order. Appellees moved for sanctions under Rule 11, and attorney's fees and costs. After summary judgment, and while their motion to reconsider was pending, the Hills filed an amended complaint naming appellees as defendants again. Appellees amended their motion for sanctions to seek sanctions against Allan DeVore as well as the Hills. After an extensive hearing, the district court awarded sanctions against appellants.

In the Tenth Circuit we apply an abuse-of-discretion standard across the board to all Rule 11 issues. *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir.). Appellants, citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir.), apparently assume that in Rule 11 cases we apply the three-tier standard, which calls for de novo review of whether the sanctioned behavior violated Rule 11. Perhaps for this reason they attempt to reargue their case on appeal, rather than demonstrate how the trial court abused its discretion in this case. In *Adamson v. Bowen*, 855 F.2d at 673 n.6, we expressly rejected the standard espoused in *Zaldivar*, and decline to embrace that standard today.

Appellants alleged in their complaint that appellees had misrepresented the meaning of "prime rate" or "base rate" in negotiating a loan with appellants. However,

appellants came forward with no evidence purported to show that appellees had made such misrepresentations. The Hills' depositions in a prior, nearly identical case indicated that neither of them was aware of any such statements by appellees. At the sanctions hearing, Ronald Hill finally testified that appellees made such misrepresentations, but the district court apparently discounted this eleventh-hour recollection. The Hills had never before presented testimony to this effect, either by deposition or affidavit, even in opposition to appellees' motion to dismiss. A reasonable inquiry would have uncovered the lack of support for the allegations against appellees in the Hills' original complaint.

Appellants also appeal the district court's award of sanctions based on the Hills' amended complaint naming appellees as defendants after appellees had won summary judgment on the original complaint. Appellants argue that the failure to name appellees in their amended complaint would have waived the Hills' rights under their pending motion to reconsider and their right to appeal the district court's order granting summary judgment. Appellants present no case to support this proposition. We agree with the district court that including appellees in the amended complaint, and forcing them to defend themselves against the same accusations upon which they had already prevailed, was unreasonable and not warranted by existing law. Furthermore, the amended complaint perpetuated the deficiencies of the original complaint. We find no abuse of discretion by the trial court.

The judgment of the district court is AFFIRMED.
The mandate shall issue forthwith.
Entered for the Court

August 17, 1989.

APPENDIX I
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 89-6045
STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation,	)	
Defendants-Appellees.	)	

ORDER

Before EBEL, SETH and McWILLIAMS, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

October 31, 1989

APPENDIX J
RULE 11
FEDERAL RULES OF CIVIL PROCEDURE

Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the

pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SAPNIOL, JR.
CLERK

No. 89-1360

In The

Supreme Court of the United States

October Term, 1990

ALLAN DEVORE,

Petitioner,

v.

STEPHEN R. KERR AND
WILLIAM O. JOHNSTONE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 89-1360

In The

Supreme Court of the United States

October Term, 1990

ALLAN DEVORE,

Petitioner,

v.

STEPHEN R. KERR AND
WILLIAM O. JOHNSTONE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents, Stephen R. Kerr and William O. Johnstone, submit this Brief in Opposition to Petitioner, Allan Devore's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition").

STATEMENT OF THE CASE

On February 12, 1988, a lawsuit was filed by the Petitioner, Allan Devore, for his clients, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill (the "Hills"), against the Respondents, Stephen R. Kerr and William O. Johnstone, and other defendants, based on common law fraud and 18 U.S.C. § 1961-62 ("RICO"), with the alleged predicate act of mail fraud under 18 U.S.C. § 1341. On September 13, 1988, the United States District Court for the Western District of Oklahoma granted Respondents' motion to dismiss treating it as a summary judgment. On September 26, 1988, the district court granted a motion to dismiss filed by two of the other defendants, United Oklahoma Bankshares, Inc. ("UOB") and Morrison G. Tucker, and authorized the Petitioner to file an amended complaint as to such other defendants. On September 27, 1988, the Petitioner filed, for his clients, a motion to reconsider the court's ruling dated September 13, 1988. On October 6, 1988, the Petitioner also filed, for his clients, an amended complaint naming Respondents and other defendants as parties. On October 19, 1988, the district court denied the September 27, 1988, motion to reconsider.

On December 1, 1988, the district court granted Respondents' motion for sanctions and awarded attorney's fees and costs against Petitioner and his clients. The district court awarded sanctions based on its finding that Petitioner had violated Rule 11 of the Federal Rules of Civil Procedure ("Rule 11," a copy of which is annexed hereto as Appendix A) by filing a complaint and an amended complaint without making reasonable inquiry to determine if such pleadings were well grounded in fact

and were warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. A concise, detailed statement of facts may be found in the April 20, 1989 Brief of Appellees - Appeal from United States District Court for the Western District of Oklahoma ("Brief of Appellees"), which is incorporated by reference herein. To avoid duplication of effort and as an aid to the Court, the statement of facts contained in the Brief of Appellees ("Statement of Facts") is annexed hereto as Appendix B.

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's judgment, holding that the district court had not abused its discretion in awarding sanctions against the Petitioner and his clients.

SUMMARY OF ARGUMENT

The present case is not appropriate for review by the Supreme Court of the United States for several reasons. First, the Tenth Circuit Court of Appeals has rendered an opinion based on "abuse of discretion" as its standard of review for Rule 11 issues. "Abuse of discretion" has been adopted by at least half of the circuit courts as the standard of review for all Rule 11 issues. All remaining circuit courts have incorporated "abuse of discretion" as part of an appropriate standard of review with regard to Rule 11 issues. Deference to the district court, as is inherent in the "abuse of discretion" standard, is appropriate in this situation, since it avoids duplication of effort, recognizes that fact-bound decisions cannot be made uniform by

appellate court review, and avoids distortion of the issues of law subject to review.

Second, the Petitioner's argument that the wrong standard of review was used demonstrates, at most, harmless error. Here, Petitioner was unable, at the sanction hearing, to offer any evidence of investigative or discovery material reviewed prior to filing the complaint, notwithstanding the existence of a prior, nearly identical case. In fact, Petitioner neither testified in his own behalf nor called any expert witness. The only two non-party witnesses called by Petitioner at the sanction hearing concede that they first met Petitioner and related their testimony on the very morning of the sanction hearing. In addition, Petitioner alleged in the complaint a claim that was precluded as a matter of law. Finally, Petitioner filed an amended complaint naming Respondents after Respondents had been granted judgment on the merits. In the face of Petitioner's complete failure to evidence the existence of any reasonable inquiry, it cannot be said his substantive rights were abused. Thus, no substantial rights of the Petitioner were affected by the use of "abuse of discretion" as the standard of review.

Third, the Petitioner's argument that the substantive law of amended complaints controls procedural law is of no consequence. When Petitioner filed the amended complaint naming Respondents, the Respondents had already obtained a judgment on the merits in their favor! It is inconceivable that the Court shall ever encounter another Rule 11 case where the record so clearly demonstrates an absence of reasonable inquiry both as to factual and legal issues. No conceivable standard of review would alter the district court's conclusion that such a compelling absence

of any showing of reasonable inquiry justified the imposition of sanctions under Rule 11. The Petitioner has presented an interesting question with regard to standards of review. Respondents respectfully submit, however, that this case is singularly inappropriate for the issuance of a writ of certiorari because of the inescapable conclusion that Rule 11 sanctions were justified under any standard of review.

ARGUMENT

I

NO SUBSTANTIAL RIGHTS OF THE PETITIONER WERE AFFECTED BY THE COURT OF APPEALS' CHOICE OF "ABUSE OF DISCRETION" AS THE STANDARD OF REVIEW FOR RULE 11 ISSUES.

A. Abuse of Discretion was a Correct Standard of Review.

The Tenth Circuit Court of Appeals has adopted an "abuse of discretion" standard of review on all Rule 11 issues. *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988); *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986); *Chevron, USA, Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985). At least half of the circuit courts apply the "abuse of discretion" standard to all Rule 11 issues. *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 930 (7th Cir. 1988); *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988); *Century Products, Inc. v. Sutter*, 837 F.2d 247, 253 (6th Cir. 1988); *EBI, Inc. v. Gator Indus., Inc.*,

807 F.2d 1, 6 (1st Cir. 1986); *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *cf. Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 724-25 (3rd Cir. 1988). Thus, the Tenth Circuit's choice of "abuse of discretion" is well-supported by the weight of authority.

The remaining circuit courts are split on the standard of review. One view embraces a "three-pronged" standard of review: (1) factual determinations of the district court are reviewed under a clearly erroneous standard; (2) the legal conclusion of the district court that the facts constitute a violation of Rule 11 is reviewed *de novo*; and (3) the appropriateness (i.e. the type or amount) of the sanction is reviewed for an "abuse of discretion." *McMahon v. Shearson/American Express, Inc.*, Westlaw 14776, ___ F.2d ___ (2nd Cir. 1990); *Equal Employment Opportunity Comm'n. v. Milavetz and Associates*, 863 F.2d 613, 614 (8th Cir. 1988); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). The other view endorses a standard of review which differs depending on the question before the court. District court decisions on the legal sufficiency of a pleading or motion are considered questions of law and are reviewed *de novo*. District court decisions as to whether factual or bad faith reasons existed to impose Rule 11 sanctions and on the appropriateness (i.e. the type or amount) of the particular sanction are reviewed only for an "abuse of discretion." *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). The use of "abuse of discretion" as the standard of review at some point in each of these two views indicates the acceptability of "abuse of discretion" as a standard of

review for Rule 11 issues, even among those circuit courts which do not use it across the board for all Rule 11 issues.

Respondents submit the "abuse of discretion" standard of review was appropriate in Petitioner's case, and deference to the district court was appropriate, as can be demonstrated by analogy to a case recently decided by this Court, *Pierce v. Underwood*, 487 U.S. ___, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988). In *Underwood*, the Court held that courts of appeals should use an "abuse of discretion" standard of review when assessing a district court's conclusion under the Equal Access to Justice Act, 28 U.S.C § 2412(d), as to whether the government's litigating position is "substantially justified." "Abuse of discretion" was chosen as the standard of review because, in part, it allows for deference to the district court. With regard to legal questions, the *Underwood* court stated:

> [S]ome cases . . . will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation. It cannot be assumed, however, that *de novo* review of this will not require the appellate court to invest substantial additional time, since it will in any case have to grapple with the same legal issue on the merits. . . .[To the contrary, on a merits appeal] the latter legal question will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been. In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. . . .
>
> . . . .

> [An additional reason for the deferential review of a district court decision is] that the question whether the Government's litigating position has been "substantially justified" is precisely such a multifarious and novel question, little susceptible, for the time being at least of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop.

108 S.Ct. at 2547-48. These considerations are of equal importance in Rule 11 cases and weigh heavily in favor of the use of "abuse of discretion" as the standard of review for all Rule 11 issues. In addition, deference on the part of this Court to the district court decision in the present case, as would be evidenced by the denial of the Petition, would be consistent with the considerations warranting deferential review expressed by the Court in *Underwood*.

The Seventh Circuit Court of Appeals endorsed the practice of giving deference to district court decisions on Rule 11 issues, when it adopted "abuse of discretion" as the standard of review for all Rule 11 issues in *Mars Steel Corp.* The court stated:

> Many judges and lawyers are concerned about the lack of uniformity in the application of Rule 11. . . . Fact bound resolutions cannot be made uniform through appellate review, de novo, or otherwise. . . . [C]ase-specific decisions should be made in the trial courts and reviewed on a deferential standard. The judgment of three appellate judges is not necessarily better than the judgment of one district judge, but it is assuredly more costly to obtain and interpret.

880 F.2d at 936 (citations omitted). *Mars Steel* endorses "abuse of discretion" as the standard of review for Rule 11 issues because it is a deferential standard. Deference to

the district court decision in the present case would be consistent with the rationale given in *Mars Steel* for choosing a deferential standard of review.

Although "abuse of discretion" is not the only possible standard of review for Rule 11 issues, "abuse of discretion" is *a* correct standard of review. At least half of the circuit courts apply the "abuse of discretion" standard of review to all Rule 11 issues. Even among those courts which do not use the "abuse of discretion" standard of review for all Rule 11 issues, "abuse of discretion" is still the appropriate standard of review at some point in the review of Rule 11 issues. When deference is not given to the trial court, as in the case of a *de novo* review, a costly duplication of effort is required; yet the appellate court will never be able to recreate to perfection the facts and the questions of law as they once existed before the trial court. Deference to the trial court avoids this distortion. Similarly, deference on the part of this Court to the district court in the present case by denying the Petition would be consistent with the considerations discussed by the Court in *Underwood* and by the Seventh Circuit in *Mars Steel*.

B. Regardless of the Particular Standard of Review Chosen, the Sanctions Against Petitioner Would Be Upheld.

The Petitioner's argument that the wrong standard of review was applied to the Rule 11 issues presented on appeal will, at most, demonstrate harmless error. A harmless error includes those errors which were merely academic, which did not prejudice the substantial rights of

the appellants, and which did not affect the outcome of the case. *State v. Button*, 178 P.2d 341, 345 (Wash. 1947). An error is harmless when it does not injure the substantive rights of the complaining party. *Eastburn v. Ford Motor Co.*, 471 F.2d 21, 22-33 (5th Cir. 1972). Thus, even if the wrong standard of review was used, the error would be harmless if the conclusion of the appellate court would have been the same, regardless of the particular standard of review chosen. New trials will not be granted for errors of law which did not reach the merits; when upon the whole case, the judgment was plainly right. *M'Lanahan v. Universal Ins. Co.*, 26 U.S. 170, 183, 1 Pet. 170, 7 L.Ed. 98 (1828). Support for the proposition that any error in the present case in the selection of the standard of review was harmless can be shown by demonstrating that the outcome of the present case would be the same under any and all of the standards of review currently being used for Rule 11 issues.

"Abuse of discretion" is the most widely accepted standard of review and was the standard of review applied by the Tenth Circuit Court of Appeals to the Rule 11 issues presented by Petitioner. Exhibit H of the Petition, incorporated herein by reference, at page H-3. The appellate court expressly chose "abuse of discretion" as the appropriate standard of review, being quite aware that "abuse of discretion" was not the only standard of review currently being used with regard to Rule 11 issues. *Id.* In its opinion, the appellate court analyzed the facts and the law with regard to the Rule 11 issues presented by Petitioner as follows:

> Appellants alleged in their complaint that appellees had misrepresented the meaning of

> "prime rate" or "base rate" in negotiating a loan with appellants. However, appellants came forward with no evidence purported to show that appellees had made such misrepresentations. The Hills' depositions in a prior, nearly identical case indicated that neither of them was aware of any such statements by appellees. At the sanctions hearing, Ronald Hill finally testified that appellees made such misrepresentations, but the district court apparently discounted this eleventh-hour recollection. The Hills had never before presented testimony to this effect, either by deposition or affidavit, even in opposition to appellee's motion to dismiss. A reasonable inquiry would have uncovered the lack of support for the allegations against appellees in the Hills' original complaint.
>
> Appellants also appeal the district court's award of sanctions based on the amended complaint naming appellees as defendants after appellees had won summary judgment on the original complaint. Appellants argue that the failure to name appellees in their amended complaint would have waived the Hills' rights under their pending motion to reconsider and their right to appeal the district court's order granting summary judgment. Appellants present no case to support their proposition. We agree with the district court that including appellees in the amended complaint, and forcing them to defend themselves against the same accusations upon which they had already prevailed, was unreasonable and not warranted by existing law. Furthermore, the amended complaint perpetuated the deficiencies of the original complaint. We find no abuse of discretion by the trial court.

Exhibit H of the Petition at pages H-3 and H-4. *See also,* Exhibit E of the Petition, incorporated herein by reference, at pages E-2 through E-5. Thus, the Rule 11

sanctions against Petitioner were, in fact, upheld under an "abuse of discretion" standard of review.

These sanctions would also have been upheld under the "three-pronged" standard of review set out in *McMahon, Equal Employment Opportunity Comm'n*, and *Zaldivar*. The first prong requires that the factual determinations of the district court be reviewed under the clearly erroneous standard. 780 F.2d at 828. The Petitioner, however, has been unable to place in issue any particular factual determination by the district court. Thus, the first prong need not be addressed in the present case.

The second prong of this alternative standard of review requires that the legal conclusion of the district court (that the facts constituted a violation of Rule 11) be reviewed *de novo*. *Id*. The facts in the present case clearly demonstrate, on *de novo* review, that the Petitioner did not make a reasonable inquiry before filing the complaint or the amended complaint to determine if such pleadings were well grounded in fact and were warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Support for this proposition can be found in several instances cited in the Statement of Facts, Appendix B. First, no evidence was offered to demonstrate, *prior* to the filing of the original complaint, that there was a factual basis for claiming that Respondents had made misrepresentations. In fact, the Hills' depositions in a prior, nearly identical case evidenced their lack of awareness of any such statements by Respondents. Statement of Facts, Appendix B, at pages B-1 through B-2. The district court correctly discounted

the eleventh-hour recollection of Ronald Hill, at the sanctions hearing, that Respondents made such misrepresentations. As the appellate court noted "[T]he Hills had never before presented testimony to this effect, either by deposition or affidavit, even in opposition to appellee's motion to dismiss." Exhibit H of Petition at page H-4. The only basis for the fraud claim appears to have been the Hills' own misconceptions. Statement of Facts, Appendix B, at pages B-1 through B-2. Second, Ronald Hill was a director of UOB and had access to loan information during the time in which he claimed to be defrauded. Consequently, Ronald Hill was *precluded* as a *matter of law* from bringing a claim based upon common law fraud. Statement of Facts, Appendix B, at pages B-2 through B-3. Third, the only two non-party witnesses called by the Petitioner during the sanctions hearing both testified they first met Petitioner and related their testimony on the very morning of such sanctions hearing! Statement of Facts, Appendix B, at page B-5. One witness conceded her knowledge was based on hearsay and never testified Respondents made false statements. Statement of Facts, Appendix B, at page B-5. The other non-party witness had no knowledge of Respondents' involvement in any loans that allegedly carried a lower interest rate than the prime rate. Statement of Facts, Appendix B, at page B-5. Finally, the Petitioner filed an amended complaint naming the Respondents *after* the Respondents had already obtained a judgment on the merits in their favor! Statement of Facts, Appendix B, at pages B-3 through B-4. A reasonable inquiry would have uncovered the lack of support for the allegations against Respondents contained in both the original complaint and the amended

complaint. Based upon a *de novo* review, it is clear that Petitioner violated Rule 11, and the imposition of sanctions was justified.

The third prong requires that the appropriateness of the sanction be reviewed for an "abuse of discretion." 780 F.2d at 828. However, Petitioner has never placed the "appropriateness" of the sanction in issue by objecting either to the type or amount of the sanction. Consequently, review under the third prong is not required.

This analysis of the present case under the "three-pronged" standard of review reveals that the appellate court's conclusion would be unchanged; the Rule 11 sanctions awarded against Petitioner were justified and would be upheld.

The remaining standard of review as set out in *Donaldson* and *Westmoreland* differs depending on the question before the court. First, a decision as to whether a pleading or a motion is legally sufficient is reviewed *de novo*. 819 F.2d at 1556. In the present case, Petitioner filed a complaint on behalf of the Hills, alleging common law fraud; but as a *matter of law*, Ronald Hill could not bring such a claim, since he was a director of UOB and had access to loan information during the times in which he claimed he was defrauded. Statement of Facts, Appendix B, at pages B-2 through B-3. In addition, the Petitioner filed an amended complaint naming Respondents, *after* Respondents had already obtained a judgment on the merits in their favor! Statement of Facts, Appendix B, at pages B-3 through B-4. *De novo* review clearly demonstrates that Petitioner failed to make a reasonable inquiry to determine if the original complaint and the amended

complaint were warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This failure justified the imposition of Rule 11 sanctions on Petitioner.

Second, whether factual or bad faith reasons exist to impose Rule 11 sanctions and the "appropriateness" of the particular sanction are reviewed for an "abuse of discretion." 819 F.2d at 1556. As Petitioner has not placed the "appropriateness" of the sanctions in issue, only the factual or bad faith reasons for sanctions will be analyzed. In the present case, no evidence was offered to demonstrate, *prior* to the filing of the original complaint, that there was a factual basis for claiming that Respondents had made misrepresentations. The evidence does suggest that the only basis for the allegations of fraud was the Hills' own misconceptions! *See* Statement of Facts, Appendix B, at pages B-1 through B-2. There is no evidence in the record that Petitioner conducted any independent inquiry prior to filing the Complaint. Indeed, except for depositions given by the Hills in a prior, nearly identical case, no evidence was offered to the district court that Petitioner obtained *any* investigative or discovery material prior to filing the complaint. Further, the only evidence as to the reasonableness of filing the amended complaint was provided by Respondents' expert witness, Andrew M. Coats. Such evidence indicated that the filing of the amended complaint was unreasonable. This testimony additionally revealed that this case is an appropriate case for sanctions under Rule 11. Statement of Facts, Appendix B, at pages B-4 through B-5. Upon these facts alone and especially in conjunction with the more detailed Statement of Facts, Appendix B, the

trial court was justified in awarding Rule 11 sanctions and did not abuse its discretion.

This analysis of Petitioner's case using the standard of review set out in *Donaldson* and *Westmoreland* also reveals that the appellate court's conclusion would be unchanged; the Rule 11 sanctions awarded against Petitioner were justified and should be upheld.

"Abuse of discretion" was a correct standard of review, even if it was not the only one available. Assuming, however, that the wrong standard of review was used by the appellate court, such error was harmless, as the same conclusion would be reached in the present case regardless of the particular standard of review chosen. Under either scenario, the substantial rights of the Petitioner have not been impaired, and this case is not appropriate for review by the Supreme Court of the United States.

II

WHETHER THE SUBSTANTIVE LAW OF AMENDED COMPLAINTS CONTROLS PROCEDURAL LAW IS OF NO CONSEQUENCE, SINCE RESPONDENTS HAD ALREADY OBTAINED A JUDGMENT ON THE MERITS IN THEIR FAVOR.

The Petitioner's argument that the substantive law of amended complaints controls procedural law is irrelevant and of no consequence in the present case. The Petitioner contends that it was necessary to name the Respondents in the amended complaint to preserve his clients' claims against the Respondents in that cause. To the contrary, Respondents had already obtained a judgment on the merits in their favor at the time the amended complaint

was filed. Consequently, the Petitioner's clients had *no claims remaining* in this cause against the Respondents. The Petitioner preserved *nothing* on behalf of his clients by naming the Respondents in the amended complaint. The Petitioner did, however, through naming the Respondents in the amended complaint, demonstrate that he failed to make a reasonable inquiry into the facts to determine if the amended complaint was well grounded and to determine if it and the allegations contained therein were warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law as required by Rule 11.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court not issue a Writ of Certiorari on any of the questions presented.

Respectfully submitted,

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APPENDIX A

FEDERAL RULE OF CIVIL PROCEDURE, RULE 11

Rule 11. Signing of Pleadings, Motions and Other Papers; Sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other

party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

APPENDIX B

STATEMENT OF FACTS

Prior to filing the present action, the Hills brought suit against United Oklahoma Bank ("UOB"), and subsequently the Federal Deposit Insurance Corporation ("FDIC"), as liquidating agent of the bank. Neither UOB nor the FDIC are parties to the present appeal. In that prior action, the Hills alleged identical causes of action as are pled in the present case but against UOB, and they relied on the same alleged "predicate acts" as the basis for their claims of common law fraud and RICO violations. (*See Hill Resources, Inc., et al. v. Federal Deposit Insurance Corporation*, Case No. CIV-87-267-R in the United States District Court for the Western District of Oklahoma) (hereinafter referred to as *"Hill v. FDIC"*). [Doc. 29 at 4].

In *Hill v. FDIC*, as well as another related proceeding, *Federal Deposit Insurance Corporation v. Hill Resources, Inc., et al.*, Case No. CIV-87-767-T in the United States District Court for the Western District of Oklahoma (hereinafter referred to as *"FDIC v. Hill"*), both of which were pending at the time the present suit was brought, discovery had been conducted based upon the identical fact situation as the present case. [Doc. 17 at 6].

In *FDIC v. Hill*, deposition testimony of Ronald Hill and Irving Hill, taken before the present action was filed, revealed that neither Kerr nor Johnstone represented to the Hills that the UOB prime rate or base rate was the best rate UOB charged its most credit-worthy commercial customers. [Doc. 21 at Exhibits "A" and "B"]. In fact, the testimony revealed that the basis of the Hills' claim of

fraud by Kerr and Johnstone was based on their own incorrect assumption that the terms "prime rate" and "base rate" were the best rates charged the bank's most credit-worthy commercial customers. [Doc. 21 at Exhibit "B"; Doc. 30 at 3].

Based upon this prior testimony of the Hills, on April 13, 1988, Kerr and Johnstone filed their Motion to Dismiss, attaching excerpts from these depositions, as well as the Affidavits of Kerr and Johnstone. [Doc. 21]. In their Affidavits, Kerr and Johnstone asserted that they never represented, nor directed any UOB employee to represent that the term "base rate" meant the rate available to UOB's most credit-worthy commercial borrowers. They further asserted that they did not use the United States mails, nor direct any UOB employee to use the United States mails to represent that the term "base rate" meant the rate available to UOB's most creditworthy commercial borrowers. [Doc. 21 at Exhibits "D" and "E"].

Kerr and Johnstone attached to their Motion to Dismiss the district court's order in *Hill v. FDIC*, whereby the court held that as a matter of law, Ronald Hill was precluded from asserting a claim based upon common law fraud since he was a director of UOB, and thus had access to information relating to the loans being made by UOB. [Doc. 21 at Exhibit "C"].

In their Brief in Opposition to the Motion to Dismiss, the Hills attached the Affidavit of Edwin J. Lippman, Jr. (the "Lippman Affidavit"), a former vice president and loan officer at UOB. [Doc. 28 at Exhibit "D"]. However, the Lippman Affidavit did not show that any fraudulent

representations were made to the Hills by either Kerr or Johnstone.

On September 13, 1988, the district court granted Kerr and Johnstone's Motion to Dismiss, treating it as a motion for summary judgment since matters outside of the pleadings were submitted by both parties. [Doc. 30 at 1]. The district court held that the Hills had failed to show any fraudulent acts by Kerr or Johnstone sufficient to state a claim based on common law fraud or RICO. Further, the district court held that as a matter of law, Ronald Hill was precluded from bringing an action based on common law fraud. [Doc. 30 at 3-4]. The district court also stated that since the Lippman Affidavit did not show that any fraudulent representations were made to the Hills by either Kerr or Johnstone, it could not be the basis for the Hills' fraud action. [Doc. 30 at 3].

On September 27, 1988, the Hills filed a Motion to Reconsider the district court's September 13, 1988 Order Granting Summary Judgment. [Doc. 33]. Only at this late stage in the proceedings, after judgment had been rendered in favor of Kerr and Johnstone, did Ronald Hill and Irving Hill prepare affidavits. Irving Hill represented that the loan officers at UOB made fraudulent representations to him, and Ronald Hill represented that specifically Kerr and Johnstone made these fraudulent representations to him. [Doc. 33 at Exhibits "A" and "B"].

On October 18, 1988, the district court denied the Hills' Motion to Reconsider. The district court specifically rejected evidence attached to the Motion to Reconsider, including the Affidavits of Ronald Hill and Irving Hill, since the Hills clearly had access to this information at

the time they filed their Brief in Opposition to the Motion to Dismiss. The district court also stated that "at least some investigation should have been done under Rule 11 of the *Federal Rules of Civil Procedure* before the Complaint was filed." [Doc. 40 at 2].

Based upon the clear lack of factual basis for the Hills' claims, on September 28, 1988, Kerr and Johnstone filed their Motion for Award of Attorney's Fees and Expenses pursuant to Fed. R. Civ. P. 11 [Doc. 34]. However, on October 6, 1988, the Hills filed their Amended Complaint, whereby they once again made allegations against Kerr and Johnstone, although arguably with greater particularity. [Doc. 36]. Since Kerr and Johnstone had already obtained judgment on the merits in their favor [Doc. 30], on October 25, 1988, they filed their motion to supplement their Motion for Award of Attorney's Fees and Expenses, adding, for the first time, claims against DeVore. [Doc. 44]. The Hills filed a response to the Motion for Award of Attorney's Fees and Expenses [Doc. 38], and the district court set these motions for a hearing on November 1, 1988 (the "November 1, 1988 Hearing").

At the November 1, 1988 Hearing, Kerr and Johnstone produced an expert witness, Andrew M. Coats ("Coats"), who testified that this case was not well grounded in fact when the Complaint was filed, based upon the previous deposition testimony of Ronald Hill and Irving Hill [Tr. 11/1/88 at 20-21, 25, 42-43], as well as the ruling against Ronald Hill in *Hill v. FDIC* [Tr. 11/1/88 at 45]. Coats further testified that the case was not well grounded in fact when the Amended Complaint was filed, since the district court had previously sustained a

motion for summary judgment in favor of Kerr and Johnstone. [Tr. 11/1/88 at 43].

The Hills produced Ann Pittenger ("Pittenger") and Robert Scott ("Scott"), former customers of UOB, as witnesses. However, upon cross-examination, it was revealed that Pittenger's knowledge of the alleged fraudulent representations was based on certain unidentified answers to interrogatories in unidentified litigation sometime in 1986. [Tr. 11/1/88 at 70-72]. No evidence was offered that either Kerr or Johnstone had any involvement in the loans which were the subject of the unidentified answers to interrogatories. Pittenger never testified that either Kerr or Johnstone ever made false statements. Finally, Pittenger revealed that she first met and related her testimony as to the alleged misrepresentations by Kerr and Johnstone to DeVore on November 1, 1988. [Tr. 11/1/88 at 70].

Scott testified merely that he was told UOB's prime rate "was the rate that (sic) bank gave its best commercial customers." [Tr. 11/1/88 at 74]. Interestingly this statement is materially different from the allegation that the rate was represented to be the "best rate for the bank's most credit-worthy customers". However, Scott never testified that Kerr or Johnstone had any involvement in any loans that allegedly carried a lower interest rate than prime. Further, Scott testified that he first met and related his testimony as to the alleged misrepresentations by Kerr and Johnstone to DeVore on November 1, 1988. [Tr. 11/1/88 at 82].

Ronald Hill also testified at the November 1, 1988 Hearing that he first learned that UOB had allegedly

made loans at less than prime rate or base rate in 1986 through his attorney, Herman Brandon. [Tr. 11/1/88 at 86]. When he learned in 1986 that UOB was allegedly making bank stock loans at less than prime rate or base rate, he testified that he spoke with the people who allegedly had these loans with UOB. However, he never physically examined the notes that were allegedly below prime rate or base rate. [Tr. 11/1/88 at 101].

Ronald Hill admitted that he did not research the applicable regulatory requirements as to interest rates that a bank must charge on bank stock loans, as well as loans secured by certificates of deposit, prior to bringing the present lawsuit. [Tr. 11/1/88 at 102, 109]. He also admitted that he first obtained documents which showed specific names of borrowers, the interest rates charged, and the amount loaned by UOB, *after* the Plaintiffs' lawsuit against the FDIC had settled. [Tr. 11/1/88 at 109, 113]. However, the Hills' lawsuit against the FDIC settled *after* the present lawsuit was filed. [Tr. 11/1/88 at 29]. Thus, although Ronald Hill testified that he reviewed the documentation received from the FDIC before filing the present action, and that he related this information to his attorney before filing the present action, this is physically impossible since Ronald Hill obtained the information from the FDIC *after* the present action was filed. [Tr. 11/1/88 at 29, 89, 113-114]. Accordingly, Ronald Hill had no physical evidence at the time he initially filed the present action [Tr. 11/1/88 at 108], and has offered only his own testimony, which has been impeached numerous

times [1], to purportedly show fraudulent conduct by Kerr and Johnstone.

Admittedly, the Hills acquired, in 1986, hearsay evidence that UOB purportedly made loans below its prime rate. [Tr. 11/1/88 at 108]. However, the Hills have offered no evidence that either Kerr or Johnstone had any involvement in the loans which were the subject of the hearsay evidence, and have conceded that Kerr and Johnstone left UOB in 1985 and possibly as early as 1984. [Tr. 11/1/88 at 95-96].

Irving Hill testified at the November 1, 1988 Hearing that he first learned that UOB was allegedly making loans to other customers at rates lower than prime rate or base rate in 1986 from Ronald Hill and from his attorney, Herman Brandon. [Tr. 11/1/88 at 122-123]. However, in his Affidavit attached to the Motion to Reconsider dated September 27, 1988, allegations by Irving Hill against Kerr and Johnstone as to alleged fraudulent representations are notably missing. [Doc. 33 at Exhibit "A"; Tr. 11/1/88 at 131, 133].

Irving Hill also revealed that he made no investigation into the applicable statutes and regulations with respect to interest rates that a bank must charge on certain types of loans. Further, he never requested that his attorney research the applicable statutes and regulations

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[1] While not an exhaustive list of instances which question Ronald Hill's credibility, *See* Tr. 11/1/88 at 94, 98 and 101-102. Further, Ronald Hill has testified the Hills had only one fixed rate loan [Tr. 11/1/88 at 109], when, in truth and in fact, many of their loans were either fixed rate or were a combination of fixed rate and variable rate notes. [Doc. 21 at Exhibit "A"].

with respect to interest rates that a bank must charge on certain types of loans. [Tr. 11/1/88 at 137].

Finally, although Irving Hill initially testified that Johnstone had made representations to him as to the meaning of the term prime rate or base rate, further questioning as well as an examination of previous testimony under oath revealed that no representations as to the meaning of the term base rate or prime rate were made by Kerr or Johnstone to him. [Tr. 11/1/88 at 116, 128, 134].

As a final point, it should be noted that there is no evidence in the record that DeVore conducted any independent inquiry prior to filing the Complaint. Indeed, except for depositions given by the Hills in *FDIC v. Hill*, no evidence was offered to the district court that DeVore obtained *any* investigative or discovery material prior to filing the Complaint. Further, the only evidence as to the reasonableness of filing the Amended Complaint was provided by Coats, Kerr's and Johnstone's expert witness. Such evidence indicated that the filing of the Amended Complaint was unreasonable. [Tr. 11/1/88 at 43]. This testimony additionally revealed that this case is an appropriate case for sanctions under Fed. R. Civ. P. 11. [Tr. 11/1/88 at 21].